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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1966

SYMONETTE SHIPYARDS, LTD.,
Petitioner,

vs.

LEE CLARK, and RUBY ZANNINO, as Administratrix of the Estate of Albert Zannino, deceased,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For The Fifth Circuit

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CITATIONS TO OPINIONS BELOW

The unreported Opinion of the Honorable ROY L. STEPHENSON, District Judge, is printed in Appendix, infra p. 1; the Opinion of the United States Circuit Court of Appeals, Fifth Circuit, dated March 19, 1964, is reported in 330 Fed. (2) 554, and is printed in Appendix A, infra p. 10; the unreported Opinion of the Honorable Emett C. Choate, District Judge, is printed in Appendix A, infra p. 17; and the Opinion of the United States Circuit Court of Appeals, Fifth Circuit, dated August 15, 1966, is reported in 365 Fed. (2) 464, and is printed in Appendix A, infra p. 26.

JURISDICTION

The Opinion of the Circuit Court of Appeals which the petitioner would have this court review, was entered on August 15, 1966 (R471), Appendix A, infra p. 26; rehearing was denied on December 23, 1966 (R 502); and an Order extending the time for filing of Petition for Certiorari for a period of ninety days from January 9, 1967, was entered on January 9, 1967, Appendix A, infra p. 40. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

I

Is the American citizenship of two "free riders" who boarded a foreign flag freighter in Miami and subsequently, while at sea, signed its articles as a device for the protection of the Captain against the possible imposition of penalties resulting from their unauthorized presence, standing alone, a factor of sufficient weight to prevent the application of the law of the flag in admiralty actions later brought in a United States District Court for the recovery of damages accruing from the death of one and the injury of the other in an accident resulting from their negligence while the ship was navigating the high seas.

The Fifth Circuit answered in the affirmative.

II

Where two experienced workmen are injured, one fatally, on the high seas solely as a result of a dangerous

condition simultaneously created by them, the ship being otherwise seaworthy, is the owner liable in damages on unseaworthiness counts in the total absence of a showing of a breach of duty on his part to furnish a seaworthy ship?

The Fifth Circuit answered in the affirmative.

STATUTES INVOLVED

Death on High Seas Act, 46 U. S. C. 761, et seq.

Jones Act, 46 U. S. C. par. 688.

STATEMENT

For clarity the parties will be referred to in the persons of the actors involved in this tragedy, i.e., the petitioner, as SYMONETTE; the respondent, Lee Clark, as CLARK; and the respondent, Ruby Zannino, Administratrix of the Estate of Albert Zannino, deceased, as ZANNINO.

References to the record will, of course, be made by the symbol "R".

One Wilson, a Miami contractor, with an erection job to be done in Haiti for Standard Oil Company, entered into an agreement for the transportation of certain equipment and material to the erection site aboard the M/V "WILLIAM SAYLES II", a ship registered in and flying the flag of the Bahamas, entirely owned by the petitioner, SYMONETTE, a Bahamas corporation.

Subsequently, arrangements were made with the Cap-

tain, but without the knowledge or consent of SYMONETTE, for a free ride aboard the ship by six of Wilson's men, with the understanding that they were to do no work for the ship but were to be allowed to repair Wilson's machinery, under the supervision of his foreman, while the vessel was enroute. (R 100, 103, 113, 115, 116).

As a part of his cargo Wilson put aboard a crane mounted on a truck chassis to be used by him in the erection of steel fuel tanks in Haiti and, possibly, as an accessory in his job of discharging cargo. As put aboard the ship it was equipped with a boom consisting of three sections of steel of a total length of at least 28 feet, supported by a one piece pendant cable. However, in anticipation of the need for a longer reach in the construction work ashore, additional cable and an extra section of boom were put aboard as a part of the package (R 229, 230, 358-359).

Shortly after leaving Nassau, an intermediate port of call, Zannino and Clark, and the rest of Wilson's men, were put to work by his foreman inserting the extra length of boom which, in turn, involved a joining job in the course of the pro tanto lengthening of the pendant cable. While several of the Wilson group, including Clark, assisted in the operation, Zannino performed the actual work involved in making the cable connection (R 359, 360), which was accomplished by simply overlapping the ends and clamping them with two u-bolts instead of by the looping method, which, as the Court found, was the proper one. While a pressure test was made to determine results the boom was not subsequently lowered so as to provide for an examination for possible slippage. Instead, the equipment was immediately put into operation by the Wilson group shifting cargo in order to facilitate unloading operations at destina-

tion, with the result that pendant cable promptly parted at the splice under the weight of the first appreciable load, in consequence of which the boom fell, killing Zannino and injuring Clark, both of whom were negligently standing directly under it.

The resulting admiralty actions were consolidated for trial purposes, and the issues, after much sifting of pleadings, were finally reduced to charges of unseaworthiness.

Two separate trials were had, the defendant, SYMONETTE, insisting each time that the Bahamas law was controlling, and the plaintiffs insisting with equal vigor on the application of the United States law.

Judge Stephenson, who presided at the first, by appointment, found that the casualties resulted solely from the negligence of Zannino and Clark in (a) improperly making the cable connection, (b) in failing to examine for slippage, and (c) standing directly under the boom at the time it fell, and that it was, therefore, not necessary for him to reach the question of seaworthiness or to make a choice as to the two systems of law since no recovery could be had under either. (Append. infra p. 1)

The Fifth Circuit, in response to the appeal of the respondents, approved the maintenance and burial allowance granted by Judge Stephenson, but sent the consolidated cases back to the District Court in order that it might have "an opportunity to consider the question of causation in the light of our determination that the doctrine of seaworthiness does here properly apply".

In its Opinion the court stressed the fact that the

record was silent as to the capabilities of Zannino and Clark in the field of cable splicing and indicated that inexperience on their part in that particular skill could be considered as a factor in determining whether the ship was, in fact, unseaworthy. (Append. infra p. 26). Clearly, the Court's opinion was a directive for an exploration as to the experience, or lack thereof, on the part of the two men in the general field of cable work.

At the second trial, presided over by Judge Emett Choate in the absence of Judge Stephenson, the respondents, in complete disregard of the appellate court's expressed interest in the subject of qualifications, and its directive to the effect that this phase of the matter be explored, offered no testimony whatever with respect thereto. Symonette, however, gratuitiously assumed the burden so cast upon the respondents, and undertook to, and did prove by unchallenged testimony that Zannino, a certified welder and steel erector, was equipped by at least nine years experience in cable work, performed under far more exacting circumstances, to make cable connections capable of withstanding burdens of ten tons and more (R 403-414), and that Clark, an experienced machinery maintenance man, was adequately equipped by months of training in this field to properly do the simple job of clamping the ends of two cables together (R358, 359), a chore "as simple as tieing your shoe", and involving no splicing, a fairly complicated process, according to the unchallenged testimony of one expert (R 417-422).

Judge Choate, nevertheless, and contrary to the only evidence on the point, i.e., that introduced by Symonette, found that both Zannino and Clark were "inexperienced", and that Symonette, accordingly, breached his duty to fur-

nish a seaworthy ship when he allowed them to create the hazardous condition resulting from their improper cable connecting job and, accordingly, rendered judgments in their favor. He did, however, mitigate damages by a finding that both men were guilty of contributory negligence, insisting that the law of the United States was controlling. (Append. infra p. 17)

It is for the review of the Fifth Circuit's affirmance of this judgment that these proceedings are taken (R 471, Append. infra p. 26).

REASONS FOR GRANTING THE WRIT

I

The Opinion of the Fifth Circuit, dated August 15, 1966 (Append. infra p. 26) holding that the American Citizenship of the "free riders", Clark and Zannino, supported only by the fact that they boarded this foreign owned and properly registered freighter in a United States port, but without the knowledge or consent of the owner, and later, while at sea, signed the articles thereof in an attempt to justify their unauthorized presence aboard was, in the selection of the controlling law, a factor of sufficent weight to negative a combination of the following counterweights, i.e.,

(a) The admitted fact that the accident happened on the high seas;

(b) the law of the flag, which, according to the unchallenged testimony of a former Chief Jus-

tice of the Bahamas, differs substantially from the United States counterpart (R 277-279);

(c) the geographical location of Nassau, the seat of the Bahamas forum, is less than two hundred miles from Miami, the residence of the respondents;

(d) the allegiance of the shipowner, which is conceded to be genuinely Bahamian, there being no hint of indirect American interests or the unfurling of a "flag or convenience,

(e) and the comity existing between the two countries which demands that the United States shall grant to the Bahamas the same respect it would seek if their positions were reversed,

is in conflict with the Opinion of this Court in LAURITZEN vs. LARSEN, 345 U. S. 571, the pertinent paragraphs of which are as follows:

"The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contract which we hold sufficient

to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law in an American transaction."

"Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag."

"It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law."

"We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort."

"Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable",

and with the opinion in McCULLOUGH vs. SOCIEDAD NACIONAL ect., 372 U.S. 10, in which this Court again stressed the paramount importance of the law of the flag;

And with the Opinion of the Second Circuit in the case of BARTHOLOMEW vs. UNIVERSAL TANKSHIPS, INC., 263 F. (2) 437, certiorari denied 359 U.S. 1000, where it, in order to give a resident and domiciliary of the United States injured on a foreign flag ship, the benefit of American law found it necessary, despite the

fact that he signed the articles in Baltimore and the ship was in United States territorial waters at the time of the casualty, to penetrate the corporate veil of the owner and hold that the vessel was, in fact, American owned, the plain inference being that except for this tour de force the law of the flag would have had to prevail;

And with the Opinion of the Second Circuit in the case of TJONAMAN vs. A/S "Glittre", 340 F. (2) 290, certiorari denied by the Supreme Court May 24, 1965, where it was held that the case of a Dutch seaman, treated as an American because of resident-alien status, should be tried according to the law of the Norwegian ship on which he was injured despite the fact that he signed the articles and boarded the vessel at Baltimore.

In fact, we have been unable to find an opinion by any court with which that of the Fifth Circuit does not conflict with reference to this matter of the selection of law.

II

It appearing from the unchallenged testimony of competent and unbiased witnesses that Zannino and Clark, and particularly the former, were, in fact, well qualified by long experience to do the simple job assigned to them by their third party employer, and that the dangerous condition resulting in their injuries was of their own creation with no contribution by Symonette, the Opinion of the Fifth Circuit holding the ship liable for their damages on the theory of unseaworthiness is in conflict with that of the Fourth Circuit in DONOVAN vs. ESSO, 259 F. 2d, 65, affirmed by Supreme Court, 359 U. S. 907, where it was held:

"Now for the first time, appellant advances a rather novel theory of unseaworthiness. He argues that loosening the topping lift made the boom unseaworthy, and that a seaman may recover even though the unseaworthy condition is created solely by his own act. He cites Grilles vs. United States, 2 Cir. 1956, 232 F. 2d 919, to support his theory. From our reading of the Grilles case, however, we do not see that it stands for this proposition. The cogent argument of appellee adequately answers appellant's contention. The appellee points out that an unseaworthiness recovery is mitigated to the extent of the seaman's own negligence. See Seas Shipping Co., vs. Sieracki, 1946, 328 U.S. 85, 94, 66 S. Ct. 872, 90 L. Ed. 1099 note 11. If the injury is caused exclusively by the seaman's negligence, there can be no recovery at all. It is therefore a hollow thing to say that a seaman has a cause of action for a condition created solely by him, but that he cannot recover damages.

"Furthermore, there was in showing that the boom was unseaworthy either before or after the act of Donovan in loosening the topping lift. It functioned normally; i.e., upon the loosening of the topping lift, the boom descended. Nor could it be said that the topping lift itself was defective because it did not hold the boom and prevent its fall. There is no evidence that the rope was in any way defective, and the topping lift of course functioned normally when it slipped around the cleat, after having been loosened by appellant.

Thus, the district court properly dismissed the unseaworthiness cause of action";

And with the Opinion of the Ninth Circuit in FREITAS vs. PACIFIC ATLANTIC SS CO., 218 Fed. (2) 562, where it was held that :

> "Unlike the situation in Petterson, the accident in this case was brought about by the improper, if not foolhardy, use of the ship's gear. We are not disposed to extend the Petterson doctrine to situations where, in the course of proving injury, facts or circumstances are developed tending to exonerate the ship";

and with its Opinion in BLAISSENGILL vs. WATERMAN, 336 Fed. (2) 367, where it was held:

> "Blaissengill might fail in this case if the only danger was brought about by himself or his fellow longshoremen in not properly placing bales in the particular slingload that injured him";

And with the opinion of the Second Circuit in PISANO vs. THE S. S. BENNY SKOU, 346 F 2d 993 unreported, where it was held that, [3]

> "The record reveals that Pisano presented no concrete proof of the cause of the accident. Pisano himself testified on examination before trial that he had, in fact, carried out his duty to rig the burton boom but had not taken a halfhitch in the preventer. An investigation after the accident established that the preventer had run free and

there was ample expert testimony to establish that the preventer would not have come loose under the strain of a two-ton load if a half-hitch had been taken. In this context, the trial court's conclusion that Pisano was 'guilty of 100% contributory negligence', 220 F. Supp. at 905, was reasonable and must be affirmed because not shown to be clearly erroneous. Gruja v. United States Lines Co., 337 F. 2d 375 (2d Cir. 1964).

"Pisano also argues that the trial court erred in denying him any recovery since the shipowner had a duty to provide safe working conditions aboard ship. *However, the court's conclusion that the 'unseaworthiness* (of the "Benny Skou"), *resulting from the manner in which the preventer was rigged, was the sole proximate cause of the injuries to libelant'*, 220 F. Supp. at 905 (emphasis supplied), indicates that the court considered the shipowner's possible liability and resolved the issues against Pisano. The District Court would have had to strain to find negligence in this case since the *shipowner or his employees had no duty to inspect every knot in the rigging of every cargo boom aboard ship.* At most, a general inspection of conditions on board rather than minute, continuous supervision of every detail entrusted to a responsible stevedoring firm was all that was needed to satisfy the duty of reasonable care under the circumstances. And, even if the shipowner must share in the abstract any liability for breach of the seaworthiness warranty with the impleaded respondent, Clark, Seas Shipping Co. vs. Sieracki, 328 U.S. 85, 89-100

(1946), it is clear that compliance with the warranty does not require an accident-free vessel" (emphasis supplied);

And with the opinion of the Second Circuit in the case of WALDRON vs. MOORE-McCORMACK LINES, INC., 356 F 2d 247, in which it was held,

"We are urged to take the position in this case that the principles of these gear and equipment cases are applicable here on the theory that any condition aboard ship that is of potential danger to the members of the crew is necessarily a condition of unseaworthiness, irrespective of how it came into existence and, of course, irrespective of any negligence or fault on the part of the shipowner or his agents or the officers or other members of the crew.

"The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned. That is to say, in order to be 'reasonably suitable for her intended service' the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the

contrary. Indeed, this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide 'an accident proof' ship, which the teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in Mitchell vs. Trawler Racer, Inc., 1960 362 U. S. 539, 550, specifically negates.

In any event, the uniform current of authority in this Circuit supports the view and we hold that, if the shipowner has furnished a well-manned ship, with a competent crew, *there can be no liability for personal injuries caused by an order of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances.*" (Emphasis supplied.)

And, to a considerable degree, with the Opinion of this Court, in Mitchell vs. Trawler Racer, Inc., 362 U.S. 539, where it was held that:

"What has been said is not to suggest that the owner is obliged to furnish an accident free ship. The duty is absolute but it is a duty only to furnish a vessel and appurtenances reason-

ably fit for their intended use. The standard is not perfection but reasonable fitness: not a ship that will weather every conceivable storm, or withstand any imaginable peril of the sea, but a vessel reasonably suitable for her intended use."

CONCLUSION

The Petitioner respectfully suggests that the application of the American law in this case runs counter to every reported authoritative opinion on the subject and that, accordingly, the decision in that respect constitutes a serious threat to international comity and invites reprisal.

Moreover, to hold a ship liable for the consequences of the foolhardy, reckless and indifferent conduct of an experienced mechanic is to hold that it is an insuror of all persons who tread its decks. We don't believe that this Court is ready to countenance any such doctrine.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

W. F. Parker
516 Ingraham Building
Miami, Florida 33131
Attorney for Petitioner

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari was served on Arthur Roth, 1111 Ainsley Building, Miami, Florida, Attorney for Respondents, this ____ day of _____, 1967.

W. F. Parker

APPENDIX

[TITLE OMITTED]

OPINION AND ORDER

The two cases were consolidated for trial along with the case of Ruby Zannino, as Administratrix of Estate of Albert Zannino, deceased, v. Fred Wilson, d/b/a Fred Wilson Construction Company, which bore the number 10760-M-LIV-EC. This latter case was tried before a jury as was the claim of Lee Clark, a minor by his father and natural guardian, Carl B. Clark, against Fred Wilson, d/b/a Fred Wilson Construction Company.

Both of these claims were decided by the jury in favor of the defendant. This leaves the claims of the plaintiff and libelant against Symonette Shipyards, Ltd. for the decision of this Court.

The case of Ruby Zannino, as administratrix of Estate of Albert Zannino, deceased v. Symonette Shipyards, Ltd., was commenced in admiralty on July 31, 1961, with the filing of a libel stating three causes of action. The first cause of action was brought under the Death on the High Seas Act, 46 U.S.C. Section 761, et seq. The second was unseaworthiness claim and the third cause of action was brought pursuant to the 1936 Shipowners' Liability Convention, 54 Stat. 1693, ratified by the United States Senate on October 29, 1939, whereby the libelant claims the Respondent is obligated to pay the funeral expenses of the decedent. The unseaworthiness cause of action was dismissed on October 12, 1961, by an order of Judge David W. Dyer. After the trial the Libelant filed a motion to amend the pleadings to conform to the proof. This motion was granted over

the objection of the Respondent. Thereafter in the amended libel the Libelant again pleaded unseaworthiness which in effect sets up a cause of action which was not a part of the trial as far as the Respondent was concerned. The Court has grave doubts as to whether this amendment should be considered, however since the Court is of the opinion that the Libelant cannot recover on the unseaworthiness count the issue will be discussed on the merits.

The case of Lee Clark v. Symonette Shipyards, Ltd. was brought to issue by the plaintiff's Fourth Amended Complaint and the answer thereto by Symonette which constitutes a general denial and the affirmative defenses of contributory negligence and the fellow servant doctrine which exists under pleaded Bahama Law. The complaint states causes of action under the Jones Act for negligence, under the general maritime law for failure to provide a seaworthy vessel and for maintenance and cure.

FINDINGS OF FACT

Under a trip charter agreement Fred Wilson was shipping aboard the defendant's ship, the Bahaman M/V William Sayle II, storage tanks and construction equipment to erect these tanks in the Republic of Haiti. Albert Zannino and Lee Clark were employed by Wilson to work on the project in Haiti. Wilson made arrangements with Symonette Shipyards, Ltd. by which these two men and four other employees of Wilson could be transported to Haiti aboard the ship with the equipment. In order for them to so ride it was necessary for them to sign the ships articles as seamen. They so signed

for the wage of one shilling per month. Although it is clear that the arrangement between Wilson and Symonette provided that they were to perform services for Wilson on Wilson's equipment while en route, there is a sharp conflict in the testimony as to the extent, if any, that they also worked as a seaman for Symonette Shipyards, Ltd.

The injuries to the plaintiffs occurred as the result of a defective splicing of the pendent cable of a crane. This splice separated within an hour releasing the boom which then fell, striking the plaintiffs who were working under the boom. Zannino, a welder by trade, and Clark, a laborer, helped in the splicing under the directions of William Ryder, another of Wilson's employees. Ryder was in charge of Wilson's crew on the ship.

The alleged negligence is that of "the respondent, his agents, servants and employees, and the officers and the fellow crewmen on the vessel." The respondent claims that if there was any negligence it was the negligence of the plaintiffs in splicing the cable and then standing under the boom which was supported by the defectively spliced cable.

The evidence shows that there was a crane on board the vessel as a part of the shipment of materials owned by Wilson which was being transported from Miami to Haiti. This crane was about to be used to lower cargo from the wing deck to the well deck. However, the boom was not satisfactory for performing the task so the six men who were put on board by Wilson proceeded to place another section onto the boom and the resultant length required the splicing of a section of cable into the pendent cable.

This splicing was performed as a "group effort" by these six men, including Zannino and Clark. It further appears that Ryder may have been in charge of the group but it is not clear that Ryder, or anyone else, actually directed the splicing. There is no showing by the preponderance of the evidence that the captain or any regular member of the crew knew of the splicing being performed and there is but conflicting testimony as to whether or not the captain ever asked that the cargo be lowered or whether he even desired that it be lowered.

It is clear that Zannino and Clark had knowledge of the manner in which the cable was spliced and to some extent both participated in the splicing. It is also clear that neither had experience along this line nor did either profess to have knowledge as to the proper methods of splicing. Nor has it been shown that anyone in the group held themselves out to have such knowledge upon which Zannino and Clark could reasonably have relied.

By undisputed testimony it was shown that this manner of splicing the cable by clamping together the overlapping ends of the two pieces, was clearly not proper or safe and that such a splice would not have been made by anyone with any knowledge of splicing.

After this splice was made it was tested by applying tension on the splice. There is no evidence that the splice was examined after this test. The crane sat idle for about an hour and then it was used to lift a small trailer filled with small items. One of the items, a small hand truck, fell off the trailer. Zannino and Clark stepped under the boom to replace the handtruck and as they did the splice parted, permitting the boom to fall and in so doing it

struck both of them. Both suffered head injuries from the blow. Zannino died instantly as a result of the injuries he received. Lee Clark has made a good recovery from his injuries.

The Court finds that the pendent cable was spliced in a manner in which the ordinary reasonable and prudent person attempting to splice a cable would not make the splice. Such an act of splicing amounted to negligence.

The plaintiff and libelant were negligent in inattentively standing under the boom of a crane which they knew was sustained by a cable which had been spliced by inexperienced persons. This is not to say that this Court feels that it is negligence to stand under the boom of a crane, but rather that under the circumstances then existing, within the full knowledge of the two injured parties, they did not exercise the care commensurate with the situation when they exposed themselves to a potentially dangerous condition without maintaining the degree of vigilance called for by the circumstances.

The aforementioned negligence of Zannino and Clark was the sole proximate cause of the accident.

CONCLUSIONS OF LAW

One of the contested issues at the trial of this case was the question of which law is to be applied.

The Bahama law is more favorable to Symonette Shipyards, Ltd. in that it maintains the common law doctrine generally referred to as the fellow servant rule. Under this rule as it exists in the Bahamas today, the ship-

owner would not be liable for any act of negligence of one of his agents if this agent was a fellow servant of the injured person. The Bahama law also provides that contributory negligence is a complete bar to any recovery.[1] These appear to the only areas in which there is a real conflict between the Bahama law and the law applicable in the United States without reference to foreign law. Since this Court is of the opinion that the sole proximate cause of the injuries complained of herein was the negligence of the injured parties it is not necessary to reach the questions raised by the affirmative defenses and therefore it is immaterial which law would have been applicable had this point been reached.

There was expert testimony that the Bahamas have a "Common law of admiralty". However, there has been no proof that the law of negligence or unseaworthiness or maintenance and cure differs in any way from the law otherwise applicable in the United States, therefore this Court will proceed under the standards of conduct as stated by the Courts of the United States.

Under these standards the Court holds that Lee Clark and decedent, Albert Zannino were negligent and the sole proximate cause of the accident resulting in their respective injuries was their negligence.

Furthermore, the plaintiffs and libelant have not shown that the vessel was unseaworthy. The case of *Donovan v. Esso Shipping Company*, 259 F.2d 65 (3d Cir.

[1]Sir Guy Henderson, former Chief Justice of the Bahamas testified as to the applicable Bahama law as follows:

a. The common law doctrine of common employment, also referred to as the fellow servant rule, is in effect in the Bahamas. Sir Guy testified: "The actual * * * statement of the doctrine might be

1958) appears to be controlling. In that case the Court found that the injury was caused solely by the negligence of the injured seaman by removing one or two of the figure eights of the topping lift by mistake when intending to loosen the guy lines to move the boom over to a catwalk or flying bridge. His attention was then diverted and while so standing in a state of inattention, the boom fell striking him.

The Court at 67 stated:

> "Now for the first time, appellant advances a rather novel theory of unseaworthiness. He argues that loosening the topping lift made the boom unseaworthy, and that a seaman may recover even though the unseaworthy condition is created solely by his own act. He cites Grillea v. United States, 2 Cir., 1956, 232 F2.d 919, to support his theory. From our reading of the Grillea case, however, we do not see that it stands for this proposition. The cogent argument of appellee adequately answers appellant's contention. The appellee points out that an unseaworthiness recovery is mitigated to the extent of the seaman's own negligence. See Seas Shipping Co. v. Sieracki, 1946, 328 U.S. 85, 94, 66 S.Ct. 872, 90 L.Ed. 1099 note 11. If the injury is caused exclusively by the seaman's negligence, there can be no recovery at all. It is therefore a hollow

that if a person caused an injury and a person suffering an injury, fellow servant, in the common employment of one master, then, if the master had taken reasonable cautions to procure apt and competent servants, then in no circumstances would he be in comon law liable for the results of that injury."

b. Contributory negligence is a complete defense under the Fatal Accident Act of the Bahamas.

thing to say that a seaman has a cause of action for a condition created solely by him, but that he cannot recover damages.

Furthermore, there was no showing that the boom was unseaworthy either before or after the act of Donovan in loosening the topping lift. It functioned normally; i.e., upon the loosening of the topping lift, the boom descended. Nor could it be said that the topping lift itself was defective because it did not hold the boom and prevent its fall. There is no evidence that the rope was in any way defective, and the topping lift of course functioned normally when it slipped around the cleat after having been loosened by appellant. Thus, the district court properly dismissed the unseaworthiness cause of action."

The facts in the present case are similar. It can likewise be stated that there was no showing that the crane was unseaworthy either before the act of splicing the pendent cable or after it was properly spliced. In fact the evidence shows that the crane was used satisfactorily in unloading the cargo at its port of destination. There is no evidence of any other defective condition of the crane or its cables.

The Court therefore finds that the vessel was not unseaworthy.

The claim of Lee Clark for maintenance[2] will be granted. Although he was negligent his conduct was not

[2]No claim for medical expenses is made. The claim is for wages, board and lodging.

"some positively vicious conduct—such as gross negligence or wilful disobedience of orders." *Warren v. United States*, 340 U.S. 523, 528 (1951). The Court finds a reasonable award is $1,000.

Likewise the claim of Ruby Zannino, Administratrix, for burial expenses will be allowed under the Shipowners Liability Convention of 1936, Art. 7, Sec. 1, 54 Stat. 1693 at 1699. The Court finds the amount of this expense is $1,250, which amount will be allowed.

Defendant will submit an order for judgment in accordance herewith.

Dated this 19th day of April, 1963.

s/ ROY L. STEPHENSON

UNITED STATES DISTRICT JUDGE
(By Assignment)

[TITLE OMITTED]

(March 19, 1964.)

Before TUTTLE, Chief Judge, and PHILLIPS* and JONES, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal of the consolidated cases of an injured person and the personal representative of a deceased person from an adverse judgment by the trial court in admiralty holding that the ship on which they were injured was not unseaworthy, and holding further that their injuries were caused solely by their own negligence, and that they were thus not entitled to recover. The trial court allowed the injured person a recovery of $1,000 for maintenance and cure and allowed the personal representative of the deceased person the sum of $1250 for funeral expenses. These allowances are the subject of a cross appeal by the Symonette Shipyards, Ltd.

Although the record, as it comes to us, is greatly complicated by the fact that here were at least three actions by each of two persons on varying theories of liability, and that there were four amended complaints filed before the case terminated, the issues finally come within a fairly simple compass. The issue is: Were these appellants seamen, at least to the extent that they were protected by the doctrine of unseaworthiness, and, if so, was the trial court's finding that the death and injury complained of were solely caused by the negligence of the individuals and not by the events preceding it, which the trial court found to be palpably negligent, clearly erroneous.

*Of The Tenth Circuit, sitting by designation.

The facts necessary to be stated in order to pose the issues accurately are as follows: Lee Clark, a minor, and Albert Zannino were two of six men who were employees of one Wilson who had a contract to erect certain petroleum product tanks in Haiti. Wilson arranged for the transportation of the tanks together with the necessary equipment to be used in their erection on a landing craft owned by Symonette Shipyards, Ltd. As a part of the agreement of transportation Symonette, acting through its proper representative, agreed with Wilson to transport the six men with the understanding that in order to comply with the laws of the Bahamas the men would have to be signed on as if they were members of the crew, although it was agreed that they should perform no duties for the ship. This subterfuge was to obviate the penalty that the ship would be subjected to if it carried passengers, since under the Bahama regulations it was not permitted to land with passengers. Included in the equipment put on board was a large crane, which both Wilson and the ship's captain understood was to be used by Wilson's men, including Zannino and Clark, to unload the ship when it arrived at its destination. Following a stop at Nassau for the unloading of cargo, one Ryder, who had been designated by Wilson as being in charge of the Wilson group, caused several of his group to attach an additional length of boom to the boom of the crane. In order to do this it became necessary for the men to add length to the cable that held up the boom, which, of course, in turn held the cable that would be attached to the cargo for use. In order to lengthen this cable, the men, including Zannino and Clark, under Ryder's supervision, simply placed the ends of the two pieces of cable together and clamped them in a manner that a pull on either end of the cable would tend to cause them to separate. There was no loop made with the

brackets or clamps fastened over the turned-back ends of the loop.

All concede, and the trial court found, that the splicing was done in a manner that no one knowing anything about such an operation would countenance. Neither Zannino nor Clark had any special knowledge or skill in splicing cables. Thereafter, after the splice was tested by lifting against a cleat on the deck of the vessel, the crane was used to lift a hand truck. Zannino and Clark were on the deck from which the truck had been lifted and when a part fell off of it they jumped under the truck to recover the part, at which time the splice parted, the boom fell and the truck fell on the two men, killing Zannino and injuring Clark.

There is a slight dispute in the testimony as to whether the boom was to be used for the benefit of the vessel to change the trim of the ship. The master stated that the boom was being worked on solely for the benefit of Wilson and he, as master, had no concern in it, where as Clark testified that the master wished to have the cargo moved on account of expected foul weather. There is further conflict in the testimony as to whether the six men did any work for the ship while on board. We find it unnecessary to resolve either of these conflicts. The trial court did not resolve them.

The trial court dismissed the appellant's count for unseaworthiness, presumably on the ground that it was determined that the men were not actual members of the crew since it was fully understood between the parties that their signing on a few hours after departure from Miami was merely a sham.

The trial proceeded on the issue of negligence and the trial court found that the splice was negligently done, but then found that the sole cause of the injuries to Clark and the death of Zannino was their "inattentively standing under the boom which they knew was sustained by a cable which had been spliced by inexperienced persons." The other pertinent findings of the court with respect to the splice were as follows:

> "The injury to the plaintiffs occurred as a result of a defective splicing of the pendent cable of a crane.
>
> . . . .
>
> "The Court finds that the pendent cable was spliced in a manner which the ordinary prudent person attempting to splice a cable would not make the splice. Such an act of splicing amounted to negligence.
>
> . . . .
>
> By undisputed testimony it was shown that this manner of splicing the cable . . . was clearly not proper or safe and that such a splice would not have been made by any one with any knowledge of splicing."
>
> . . . .
>
> "It is clear that Zannino and Clark had knowledge of the manner in which the cable was spliced and to some extent both participated in the splicing. It is also clear that neither had experience along this line, nor did either profess to have

knowledge as to the proper methods of splicing. Nor has it been shown that any one in the group held themselves out to have such knowledge upon which Zannino and Clark could reasonably have relied."

Although, as heretofore stated, it is not necessary to resolve the question whether these six men were seamen with limited or no duties to perform aboard the vessel or were passengers who were traveling under the pretense of being seamen,[1] this does not mean that the issue of unseaworthiness is not an important issue in the case. Clearly, if the men were seamen they would be entitled to the protection of the shipowner's duty to furnish a seaworthy vessel. The reason we say it is not necessary for us to resolve this issue is that on the admitted facts we think it equally plain that these men, who were injured by equipment that the shipowner and the shipper had agreed was to be used in unloading the vessel, were equally entitled to the shipowner's obligation to prevent their being injured

[1]It is a little difficult to understand why the vessel was not bound by the written articles by which the six men signed on as members of the crew in spite of the understanding had between the owner of the vessel and Wilson, the employer of the six men. It is clear from the record that none of the six men participated directly with the representative of the vessel in the arrangements that would make them something other than seamen. There is no testimony from which the trial court could find that the six men themselves ever undertook to modify the actual terms of the papers which would normally constitute the written contract between the parties. Moreover, a strong case could be made by the proposition that, no matter what the reason was for signing the men on as seamen (here it was obviously because they could not be carried as passengers), nevertheless they were signed on as such and the parties were entitled to such benefits and detriments as flowed therefrom even though they were subject to a general understanding that they were not to do any of the duties normally assigned to seamen. Again we can but wonder: what has happened to the parole evidence rule?

by any part of the vessel or the equipment used in performing the work ordinarily done by longshoremen.

In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, the Supreme Court held that a longshoreman who had come aboard to assist in the unloading of a vessel was entitled to the shipowner's "warranty" of seaworthiness. Later, in *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406, the Court construed the *Sieracki* decision so as to permit it to hold that a carpenter who went aboard a vessel to repair its grain loading equipment was likewise protected by the doctrine of seaworthiness since he was exposed to the same shipboard risks as a longshoreman. Finally in *Alaska Steamship Co., Inc. v. Petterson*, 347 U.S. 396, the Court, by a per curiam judgment, applied the principle of the *Sieracki* and *Hawn* cases to a situation in which the equipment that injured the stevedoring employee was equipment *brought aboard the ship by the stevedore himself*. In the light of this decision, it seems that without doubt the repair work done on the crane which was to be used for unloading the vessel placed the participants in this work in as favored a position as was the stevedore in *Petterson*.

We note that the trial court found that the injury to the appellants here was caused solely by their negligence. However, the Court found specifically that the equipment had been negligently repaired and that the "injury to the plaintiffs occurred as a result of defective splicing of the pendent cable of a crane." In light of the fact that the trial court held that the doctrine of unseaworthiness did not apply for the benefit of these plaintiffs, we can not permit the trial court's findings with respect to the sole cause of the injury to stand without that court's having an opportunity to consider the

question of causation in light of our determination that the doctrine of seaworthiness does here properly apply.

While it is not clear exactly how the trial court concluded that the sole cause of the injury was the plaintiffs' inattentively standing under the boom which they knew was sustained by a cable which had been spliced by inexperienced persons" in light of the court's other findings that neither Clark nor Zannino were experts with respect to splicing, and without any evidence from which the trial court could find that they individually should have known that the splice was not sufficient, nevertheless we think it would be premature for us at this time to determine whether the ultimate finding of causation was clearly erroneous. We think the trial court should consider the evidence touching on the negligence in the splicing and the negligence, if any, of the plaintiffs in reacting as they did when the boom was suspended above them in light of our holding that these plaintiffs were both entitled to the protection of the doctrine of seaworthiness.

For the reasons already enunciated, it is clear that the trial court did not err in granting the relief to Zannino and Clark for burial expenses and maintenance and cure, which it did allow.

In order that the trial court may give further consideration to the claims of Zannino and Clark arising from the condition of unseaworthiness that we think the uncontested facts clearly prove existed, the judgment against the appellants is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

App. 17

[TITLE OMITTED]

OPINION

(Findings of Fact and Conclusions of Law)

These causes were originally tried before another judge of this Court in December, 1962. Judgment was entered thereon on May 3, 1963, and appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. The Circuit Court by its opinion of March 19, 1964, *Clark vs. Symonette Shipyards, Ltd.*, 330 F.2d 554 (5th Cir. 1964), reversed the judgment and remanded the cause to this Court. The cause came on for second trial on remand on July 22, 1964. The cause was tried on the record of the prior proceedings plus additional testimony submitted by the parties.

It was determined by the original trial record of this matter together with the appellate decision that the Plaintiff and Libelant's Decedent, regardless of their disputed status aboard the vessel, were entitled to the protection of the doctrine of unseaworthiness. It was also clearly established that the cable splice which precipitated the sequence of events was faulty, and unsafe as rigged.

In the original judgment it was determined that the sole cause of injury to Clark and the death of Zannino was their own negligence. The appellate Court remanded to this Court to reconsider the question of causation in view of the appellate determination that the Plaintiff and Libelant were entitled to rely on the doctrine of unseaworthiness. With the exception of stating certain facts proved by new testimony in the second trial, there appears

to be no necessity for this Court to enter findings repeating the facts previously determined and no longer at issue. They appear in the record and are set forth in general fashion at 330 F.2d at 555-56.

New testimony offered clearly established that Zannino possessed much of the knowledge required of rigger all gained as a part of his duties as boilermaker. A supervisor of one of his former employers testified that between 1956 and 1960, Zannino did welding and rigging jobs for up to ten ton loads and that splicing of cable was part of a boilermaker's trade. This was also confirmed by an additional witness. It was also established that Plaintiff, Clark, had worked in heavy construction for a substantial period of time and while not qualified as a rigger was not entirely naive in regard to splicing and the handling of heavy equipment generally, and the rules as respect the lifting of objects.

It is well established that the owner's duty to furnish a seaworthy ship is absolute and completely independent of the duty to exercise reasonable care. Although the owner is not obligated to furnish an accident-free ship, there is the absolute, non-delegable duty to furnish a vessel and appurtenances reasonably fit for their intended use. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). Under the doctrine, the owner is responsible for the unseaworthiness of equipment that does not belong to the shipowner and is not part of the ship's equipment which is brought on board for loading or unloading. *Alaska Steamship Co., Inc. v. Petterson*, 347 U.S. 396 (1954).

The Respondent makes much of the contention that no negligence was shown on the part of the Respondent.

Having determined that an unseaworthy condition prevailed, it is not necessary for the Court to reach the question of negligence. We agree that the Plaintiff—Libelant's case on negligence is not strong, however, the proctor for the Respondent is on weak legal ground when he cites *Lindgren v. United States*, 281 U.S. 38 (1930) as authority for the proposition that recovery cannot be made by a personal representative on a count of unseaworthiness without proof of negligence. Not only was this case decided when there still prevailed a definite aura of negligence in an action based on unseaworthiness, see for example, *Cookingham v. United States*, 184 F.2d 213 (3rd Cir. 1950), cert. denied, 340 U.S. 935 (1951), but more important the case involved a determination under the Merchant Marine Act and not the Death on the High Seas Act. The present law was well stated by Chief Judge Sweeney in *Chermesino v. Vessel Judith Lee Rose, Inc.*, 211 F.Supp. 36 (1962), affirmed 317 F.2d 927 (1st Cir. 1963), cert. denied, 375 U.S. 931 (1963). He said at 211 F.Supp. 38,

> " . . . . the words 'wrongful act, neglect or default' are not limited to negligence, ... a wrongful act is any act which will in the ordinary course, infringe upon the rights of another to his damage. A seaman, or one standing in his shoes, has a right to a seaworthy ship and infringement of that right constitutes a wrong act."

The Court finds that the owner, Defendant-Respondent, herein breached the duty to furnish a seaworthy vessel when the master allowed the inexperienced *seamen* (by definition only) to use heavy equipment to move cargo about the vessel on the high seas in anticipation of un-

loading and thereby allowed an improper and dangerous splice to be made rendering one of the vessel's appurtenances unfit for its intended use. Such unseaworthy condition was a proximate cause of the injuries and death complained of.

However, the Court finds that the negligent participation of Zannino, *an experienced rigger*, in the making of this improper splice together with his stepping under the moving load, contributed fifty percent to the proximate cause of his death. Further, the Court finds that the negligence of Clark, experienced in heavy construction work, by his stepping under the moving load contributed twenty-five percent to the proximate causing of his injuries. Such contributory negligence proximately causing the injuries complained of reduces the amount of recovery proportionately whether the action is based on negligence or unseaworthiness. See *Pope and Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

The Respondent has presented to the Court a conflict of laws question by his insistence that the Bahamian law should govern this cause. As this Court announced at the pre-trial stage and subsequently at trial, it was and is of the opinion that the rights of American seamen, signed on in a United States port, are governed by the law of the United States when action for injury on the high seas is brought in a domestic forum even though they signed on a foreign flag vessel. Respondent relies upon *Lauritsen v. Larsen*, 345 U.S. 571 (1953) for the proposition that the "law of the flag" must govern here. However, the actual decision in the *Lauritsen* case involved a Danish seaman on a Danish vessel, injured in Cuban waters, and certainly is not applicable here. Moreover, dictum in that case rec-

ognized the situation which we have here. In 345 U.S. at 586, the Court said,

> "But also, each nation has a legitimate interest that its nationals or permanent inhabitants be not maimed or disabled from self-support. In some later American cases, courts have been prompted to apply the Jones Act by the fact that the wrongful act or omission alleged caused injury to an American citizen or domiciliary."

Thus, the high Court, itself, in *Uravic v. F. Jara Co.*, 282 U.S. 234 (1931) held that American law applied to a U.S. seaman injured on a German vessel. The *Lauritsen* case did not purport to overrule the *Uravic* case which it cited. Certainly, the Court of Appeals whose decision in *Lauritsen* was reversed by the Supreme Court does not understand the *Lauritsen* opinion to have the broad scope attributed to it by Respondent. See, for example, the excellent post-Lauritsen discussion in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2nd Cir. 1959) where United States law was applied in a case similar to this although the parties were reversed, *viz.*, the seaman was a citizen of the British West Indies signed on a Liberian vessel under ownership of American stockholders in a Panamanian corporation.

Moreover, the Court is of the further opinion that even if the conflicts rule were otherwise that no foreign law was presented which would prevent the recovery or impose other than a comparative fault rule herein. Foreign law must be proven. The only proof tendered to the Court was the testimony of Sir Guy Henderson. On direct testimony for the Defendant—Respondent, he indicated

that proof of negligence was necessary under Bahamian law and that the fellow servant doctrine and contributory negligence were a bar to recovery. However, on cross-examination Sir Guy testified that a personal representative would have the same rights of action as the Decedent would have had had he survived. The cross-examination then brought out that the British maritime as opposed to common law is the same as the United States admiralty law, and that the doctrine of unseaworthiness is recognized in that law. None of Sir Guy's testimony provided the Court with any information as to whether or not proof of negligence is necessary to maintain an action for unseaworthiness, or whether or not the common law defenses are an absolute bar as opposed to mitigation of a damage award. The Court certainly is not prepared to state what the Bahamian or English maritime law is in this regard.

As indicated in the landmark case of *The Osceola*, 180 U.S. 158 (1902), and as seen in both the majority and minority opinions in *Mitchell v. Trawler Racer, supra.*, the development of our present broad concept of the owner's responsibility for unseaworthy conditions has left behind it a very tangled web of historical precedent as it matured out of its original English and Continental sources. The Court would hazard the guess that English and Continental maritime law is not presently as generous to the injured seaman as our own Supreme Court. However, review of Sir Guy's testimony makes it obvious that on direct while he was discussing cases brought upon Lord Campbell's Act, he was considering only those sounding in the tort of negligence. To these, as he stated with undoubted correctness, the common law defenses would apply. It was equally obvious from the cross-examination

that Sir Guy was not testifying as to the requisites for recovery in an action based on the yessel's unseaworthiness. No proof having been offered as to the Bahamian law of unseaworthiness other than the fact that it exists, the Court only concludes that it is the same as that of the United States, and the need to resolve the conflicts question does not arise.

Turning now to damages, the Court notes that Lee Clark's maintenance and cure have been awarded by previous judgment entered herein. In the accident he suffered a skull fracture of which all trace had disappeared by the time of second trial. He suffered various contusions and lacerations in the area of his right shoulder and face. He had minor scarring in the area of his scalp and forehead and claims occasional headaches and soreness and discomfort in his shoulder. Testimony was offered to show that his average weekly wage was $100.00 and that he lost $1,620.00 in wages. The Court finds that Lee Clark suffered $6,000.00 in damages which are reduced twenty-five percent, and he is entitled to recover the sum of $4,500.00 from the Defendant, Symonette Shipyards, Ltd.

Albert Zannino was born April 4, 1923. It was established that he was in good health at the time of his death. It was established that for the three years preceeding his death, his average gross income was slightly under $10,000.00 per year. Surviving him as dependent beneficiaries, were his widow, Ruby Koutumas (now remarried); his daughters Barbara Jean Tucker, age 21 (who married on July 20, 1962), Carolyn Ashmore, age 19 (who married on November 30, 1963), and Nancy Thornton, age 18 (who married on May 1, 1963); and his son, Albert Zannino, now 15 years of age.

The Court finds that the loss of direct support to his family based on his established earning capacity and reasonable life and earning capacity when reduced to present dollar value would amount to $85,000.00. This amount reduced by fifty percent to $42,500.00 is awarded to the Administratrix for Albert Zannino's dependent beneficiaries, and she is entitled to recover the sum of $42,500.00 with interest from May 8, 1961, from the Respondent, Symonette Shipyards, Ltd.

The award to the Administratrix should be apportioned as follows:

a). For their loss of support and maintenance and other probabilities of pecuniary benefits to; Barbara Jean Tucker, $1,500.00; Carolyn Ashmore, $3,000.00; Nancy Thornton, $2,400.00.

b). For his loss of support and maintenance and education and other probability of pecuniary benefits to Albert Zannino, Jr., $12,500.00. This award is to be placed in guardianship in a court of competent jurisdiction in accordance with the usual procedure in these matters, after the deduction as below of pro rata share of the expenses and fees earned in this litigation.

c). The remainder of the Administratrix award is to go to the Decedent's wife, Ruby Koutumas, formerly Ruby Zannino, in the amount of $23,600.00.

d). The Administratrix shall pay the expenses and fees of this litigation out of the gross

award, charging each of the dependent beneficiaries a pro rata share thereof.

Judgment should be submitted by counsel in accordance herewith.

Entered in Miami, Florida, this 4th day of August, 1964.

(Signed) Emett C. Choate
UNITED STATES DISTRICT JUDGE

[TITLE OMITTED]

(August 15, 1966.)

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

Hughes, District Judge: This is the second appeal of the consolidated cases of Lee Clark, an injured person, and Ruby Koutumas, the administratrix of the Estate of Albert Zannino, deceased, against Symonette Shipyards, Itd., (Symonette). The death case was filed under the Death on the High Seas Act[1] and the Jones Act[2] and suit for injury under the Jones Act and General Maritime Law.

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[1]41 Stat. 537 (1920), 46 U.S.C. §§ 761-68. Section 1 of the DHSA, 46 U.S.C. § 761provides:

"Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

[2]41 Stat. 1007 (1920), 46 U.S.C. § 688, which provides:

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The first question to be disposed of, raised by Koutumas, is whether the appeal by Symonette was timely filed. The record reveals that Symonette filed its notice of appeal twenty eight days after the trial court's denial of the motion for new trial which had been timely filed. Koutumas contends that the appeal should be dismissed because it was filed more than ninety days following the entry of final judgment. This court in the recent case of *Gulfstream Shipping Co., Ltd. v. Collins & Tolson*, 356 F.2d 466 (5th Cir. 1966), decided this question adverse to Koutumas when it decided affirmatively the question of

> "whether the period for seeking review (in an admirably case) begins to run from the date of the court's denial of the motion for rehearing rather than from the date of the court's entry of the motion where the motion for rehearing is filed within the period allowed for appealing from the original judgment." 356 F.2d at 467.

On the first appeal, the facts surrounding the accident in which Zannino was killed and Clark was injured were ably summarized by the Court as follows:

> "* * * Lee Clark, a minor, and Albert Zannino were two of six men who were employees of one Wilson who had a contract to erect certain petroleum product tanks in Haiti. Wilson arranged for the transportation of the tanks together with the necessary equipment to be used in their erection on a landing craft owned by Symonette Shipyards, Ltd. As a part of the

agreement of transportation Symonette, acting through its proper representative, agreed with Wilson to transport the six men with the understanding that in order to comply with the laws of the Bahamas the men would have to be signed on as if they were members of the crew, although it was agreed that they should perform no duties for the ship. This subterfuge was to obviate the penalty that the ship would be subjected to if it carried passengers, since under the Bahama regulations it was not permitted to land with passengers. Included in the equipment put on board was a large crane, which both Wilson and the ship's captain understood was to be used by Wilson's men, including Zannino and Clark, to unload the ship when it arrived at its destination. Following a stop at Nassau for unloading of cargo, one Ryder, who had been designated by Wilson as being in charge of the Wilson group, caused several of his group to attach an additional length of boom to the boom of the crane. In order to do this it became necessary for the men to add length to the cable that held up the boom, which, of course, in turn held the cable that would be attached to the cargo for use. In order to lengthen this cable, the men, including Zannino and Clark, under Ryder's supervision, simply placed the ends of the two pieces of cable together and clamped them in a manner that a pull on either end of the cable would tend to cause them to separate. There was no loop made with the brackets or clamps fastened over the turned-back ends of the loop.

> "All concede, and the trial court found, that the splicing was done in a manner that no one knowing anything about such an operation could countenance. . . . Thereafter, after the splice was tested by lifting against a cleat on the deck of the vessel, the crane was used to lift a hand truck. Zannino and Clark were on the deck from which the truck had been lifted and when a part fell off of it they jumped under the truck to recover the part, at which time the splice parted, the boom fell and the truck fell on the two men, killing Zannino and injuring Clark." 330 F.2d at 555.

It is the contention of Symonette that since the accident happened on a ship registered in and flying the flag of the Bahamas and actually owned by a citizen of that country the trial court erred in applying the law of the United States rather than that of the Bahamas.

Reliance is placed by Symonette on *Lauritzen v. Larson*, 345 U.S. 571 (1953), for its proposition that the "law of the flag" must govern. It is true that the Supreme Court held in *Lauritzen* that Danish law, the law of the flag, controlled, but in addition, the plaintiff there was a Danish citizen and had signed the ship's articles providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seaman's Union of which the plaintiff was a member. The facts in this appeal are entirely different.

Of the seven factors listed in *Lauritzen* as influenc-

ing the choice of law,[3] i.e., place of the wrongful act, law of the flag, allegiance of the injured, allegiance of shipowner, place of contract, inaccessibility of foreign forum, and the law of the forum, only two (law of flag and allegiance of the ship owner) lend some support to Symonette's argument. In the context of this case, we believe the most significant choice of law factor to be the nationality of the injured and deceased seamen. As the Supreme Court indicated in *Lauritzen*, ". . . (1)ach nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support." 345 U.S. at 586. In addition the ship's articles were signed in the United States and the contract between Symonette and Wilson to transport tanks and equipment was made in this country. The two seamen were part of a crew assembled by Wilson, an American businessman, for use on an enterprise of his located in Haiti. We are of the opinion that the citizenship of the seamen and the factors surrounding their employment are sufficient to justify applying the law of the United States.[4] See Gilmore & Black, Admiralty § 6-64, at 388 (1957).

With reference to other factors mentioned in *Laurit-*

[3]The board principles of choice of law established for Jones Act cases in *Lauritzen* were declared equally applicable to cases arising under the General Maritime Law in Romero v. International Terminal Operating Co., 358 U.S. 354, 381-84 (1959).

[4]Symonette relies heavily on Tjonaman v. A/S Glittre, 340 F.2d 290 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965), to support its argument that the governing law in the case should be that of the Bahamas. Although the seaman in *Tjonaman* was an American national, we believe the application of Norwegian law there was justified not merely because the vessel was a Norwegian flag ship, but also because the seaman had signed the Norwegian shipping articles in the office of the Norwegian Consulate General in New York and these articles provided expressly that the seaman's rights and duties would be governed by Norwegian law. The preponderance of connecting factors to the foreign jurisdiction in *Tjonaman* are simply not present in the pending case.

zen for the choice of law, while the forum is held in *Lauritzen* to be of little significance, it might be well to point out that in this case the law of the United States is established and easily determinable, whereas the evidence relating to the law of the Bahamas is vague and indefinite. We agree with the finding of the trial court that the testimony of the expert witness relating to Bahamian law did not establish "whether or not proof of negligence is necessary to maintain an action for unseaworthiness or whether or not the common law defenses are an absolute bar as opposed to mitigation of a damage award." We find no error in the trial court's ruling that the law of the United States should govern.[5]

[5]Even if Bahamian law were held to govern in this case, the District Judge correctly applied American maritime law in light of his finding, amply supported by the record, that Symonette had failed to prove the pertinent principles of Bahamian law. As Justice Frankfurter stated some years ago:

> "It is true that this [Supreme] Court has on several occasions held international rules which had passed into the 'general maritime law' to be subject to judicial notice. . . . But where less widely recognized rules of foreign maritime law have been involved, the Court has adhered to the general principle that foreign law is to be proved as a fact." Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd., 336 U.S. 386, at 396-97 (1949).

In view of the fact that no body of reported decisions of Bahamian cases exists and that the only source of Bahamian case law is found in the knowledge and memory of local practitioners, Symonette was obligated to present clear proof of the relevant legal principles if it hoped to apply such law. See United States *ex rel.* Zdunic v. Uhl, 137 F.2d 858, 861 (2d Cir. 1943); Rowan v. Commissioner of Internal Revenue, 120 F.2d 515, 516 (5th Cir. 1941); Liechti v. Roche, 198 F.2d 174, 176 (5th Cir. 1952); Tidewater Oil Co. v. Waller, 302 F.2d 638, 640 (10th Cir. 1962); McCormick, Evidence § 326, at 698-701 (1954); 9 Wigmore, Evidence § 2573 (3d ed. 1940, Supp. 1964); Ehrenzweig, Conflict of Laws § 129, at 365-66 (1962). In the absence of sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the modern view is that the law of the forum should be applied. See Leary v. Gledhill, 8 N.J. 260, 84 A.2d 725 (1951); Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom, 347 F.2d 168, 174-75 n.3 (5th Cir, 1965); Todd Shipyards Corp. v. The City of Athens, 83 F.Supp. 67, 83 (D. Md. 1949); Currie, On the

In the first trial where the District Judge denied the seamen's claims for general damages, he found that the splice was negligently made but expressly held that the doctrine of seaworthiness did not apply. He concluded that the sole cause of the injuries to Clark and the death of Zannino was their "inattentively standing under the boom which they knew was sustained by a cable which had been spliced by inexperienced persons."

On appeal this Court determined that the district court erred in holding that the doctrine of seaworthiness did not apply for the benefit of the seamen. We directed that "the trial court . . . consider the evidence touching on the negligence in the splicing and the negligence, if any, of the plaintiffs in reacting as they did when the boom was suspended above them in light of our holding that these plaintiffs were both entitled to the protection of the doctrine of seaworthiness." 330 F.2d at 557.

With this Court's determination that the doctrine of seaworthiness was applicable, it was the duty of the trial judge on remand to find whether the vessel was in fact unseaworthy, whether such unseaworthiness, if any, was a proximate cause of the injury of Clark and death of Zannino, whether Clark and Zannino were negligent, and if so, whether such negligence was a proximate cause of the injury and death.

In determining the correctness of the trial court's

Displacement of the Law of the Forum, 58 Colum. L. Rev. 964 (1958); Goodrich, Conflict of Laws § 83, at 149 (Scoles ed. 1964); Ehrenzweig, *op. cit. supra*, § 129, at 366-68. This is precisely what the District Judge did in this case, and we believe he was correct.

For a comprehensive and scholarly analysis of this question, see Seguros Tepeyec, S.A., Compania Mexicana v. Bostrom, *supra*, 347 F.2d at 174-75 n.3 (Wisdom, J.).

finding that Symonette breached its duty to furnish a seaworthy ship, it is necessary to examine the cases of the Supreme Court interpreting the doctrine of seaworthiness. We find that the decisions of the last twenty years clearly support the result. In the landmark case of *Mahnich v. Southern S. S. Co.*, 321 U.S. 96 (1944), the Court held a shipowner liable for an unseaworthy condition and declared that the duty to furnish a seaworthy ship is absolute and not based on negligence. The facts were that Mahnich was injured by the collapse of a staging, caused when a defective rope supporting it parted.

This theory of "absolute" liability was reiterated and further developed two years later in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Justice Rutledge explained:

> "[The character of the doctrine] is essentially a species of liability without fault, analogous to other well known instances in our law . . . [T]he liability is neither limited by conceptions of negligence nor contractual in character." 328 U.S. at 94.

Sieracki expanded the seaworthiness doctrine to cover longshoremen injured aboard a ship while doing work ordinarily performed by seamen. The stevedore in that case was loading cargo on the vessel when he was injured by the breaking of a shackle which caused a boom and tackle to fall.

Since the *Sieracki* case the Supreme Court decisions have reflected the absolute duty of the shipowner to furnish a seaworthy ship for seamen completely independ-

ent of his duty under the Jones Act to exercise reasonable care. In *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), the doctrine of seaworthiness was extended to cover a carpenter who went on board to repair the ship's grain loading equipment, and in *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954), *affirming per curiam*, 205 F.2d 478 (9th Cir. 1953), to a stevedore who was injured by equipment brought aboard by the stevedore himself and over which the shipowner had no control.

As these cases indicate beyond any doubt the application of the doctrine of seaworthiness as thus evolved "is a complete divorcement of unseaworthiness liability from concepts of negligence." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

In line with the above authorities we find substantial evidence to support the trial court's finding:

> "[Symonette] breached the duty to furnish a seaworthy vessel when the master allowed the inexperienced seamen (by definition only) to use heavy equipment to move cargo about the vessel on the high seas in anticipation of unloading and thereby allowed an improper and dangerous splice to be made rendering one of the vessel's appurtenances unfit for the intended use. Such unseaworthy condition was a proximate cause of the injuries and death complained of."

The fact that the equipment did not belong to the shipowner or was not part of the ship's own equipment does not alter the fact that the vessel had become unseaworthy. *Alaska S. S. Co. v. Petterson, supra.*

With reference to the negligence of Zannino and Clark, the record as a whole gives credence, one, to the finding of the trial judge that Zannino had considerable experience in connecting cable, and, two, that he actually made the defective connection. Clark's lack of experience as a rigger and his non-participation in the actual splicing reduce the degree of contributory negligence chargeable to him. The trial court's finding that Zannino's negligence in the manner in which he spliced the rigging and his walking under the trailer contributed 50% to his death and Clark's negligence in walking under the trailer contributed 25% to his injury finds support in the evidence and is certainly not clearly erroneous.

With reference to contributory negligence, it is the contention of Symonette that any negligence of the seamen bars their recovery for general damages while counsel for Clark and Koutumas suggests the possibility that contributory negligence cannot reduce the amount of damages awarded for unseaworthiness. Neither contention is supported by the cases.

The facts of the recent case of *Ktistakis v. United Cross Navigation Corp.*, 324 F.2d 728 (1963), *cert. denied*, 377 U.S. 915 (1964), are similar to the present case in that Ktistakis was responsible in part for the unseaworthy condition which caused his injury. Plaintiff, the second mate of the ship, was in charge of work that included the emptying of spill tubs from time to time. The slippery condition from the dripping of the oil on the deck caused the fall and injury of the plaintiff. The trial court found the mate contributorily negligent and reduced the damages 50 per cent. While the effect of contributory negligence as a bar or to reduce damages was

not raised, by affirming, the Court of Appeals necessarily rejected the theory that contributory negligence was a bar to recovery and "approved the mitigation of damages by reason of the seaman's contributory negligence." 324 F.2d at 729.

The subsequent denial of the petition for certiorari by the Supreme Court, *Ktistakis v. United Cross Navigation Corp.*, 377 U.S. 915 (1964), indicates no position by the High Court on the lower court dispositions of that case.

Other Supreme Court cases, however, do indicate that damages awarded for unseaworthiness are mitigated to the extent that the seaman's injury was also proximately caused by his own negligence. In *Sieracki*, Justice Rutledge stated that "contributory negligence . . . in suits brought by seamen to recover for injuries due to a ship's unseaworthiness . . . has been applied merely in mitigation of damages." *Seas Shipping Co. v. Sieracko*, 328 U.S. 85, 94 n.11 (1946). And in *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953), Justice Black wrote for the Court:

> "The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires." 346 U.S. at 408-09.

The same point is covered in the concurring opinion of Justice Frankfurter:

> "The right of seamen to recover for unseaworthiness is peculiarly a cause of 'admiralty and maritime jurisdiction,' 1 Stat. 73, 77. The right is in the nature of liability without fault for which contributory negligence is not a bar to recovery, although it may be relevant in assessing the damages." 346 U.S. at 415.

There was no error in the trial court's reduction of damages on account of the contributory negligence of Zannino and Clark.[6]

This leaves only the question of the amount of damages and their apportionment according to the formula chosen, and we review these findings under the "clearly erroneous" test. See *McAllister v. United States*, 348 U.S. 19 (1954); *Guzman v. Pichirilo*, 369 U.S. 698, 702 (1962). A review of the evidence indicates that the amount and the apportionment were not clearly erroneous and should not be set aside.

The judgment is accordingly AFFIRMED.

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[6]This Court has previously upheld a district court finding that "'. . . . The doctrine of comparative negligence is in full effect under both the Jones Act and general maritime law or admiralty and the [libelant] is barred from recovery under either by reason of his own negligence, it being one hundred percent.'" Keel v. Greenville Mid-Stream Service, Inc., 321 F.2d 903, 904 (5th Cir. 1963 (per curiam).

[TITLE OMITTED]

Appeals from the United States District Court for the Southern District of Florida

Before Wisdom and Coleman, Circuit Judges, and Hughes District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, Symonette Shipyards, Ltd., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 15, 1966

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 22486

SYMONETTE SHIPYARDS, LTD.,
Appellant - Appellee,

vs.

LEE CLARK, ET AL.,
Appellees - Appellants

(AND REVERSE TITLE)

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING

(December 23, 1966)

Before Wisdom and Coleman, Circuit Judges, and Hughes, District Judge.

It is ordered that the Petition for Rehearing in this cause is hereby

DENIED.

[TITLE OMITTED]

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

Done at New Orleans, La., this 9th day of January, 1967.

/s/ Sarah T. Hughes
United States District Judge